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No. 83 - 2142

IN THE

Supreme Court of the United States

October Term, 1984

DAVID KAPLAN,

Petitioner,

-against-

CATHERINE J. RUGGIERI, MARGARET S. MacNAMARA, THEODORE MUZIO, GERARD T. O'BOYLE, MELVIN MARTIN, MARGUERITE A. DONNELLY, ROBERT M. HENDRICK, EARL R. WOODS, PAUL S. SZABO, JOHN C. ALEXION, C. CARL ROBUSTO; ST. VINCENT'S COLLEGE, A UNIT OF ST. JOHN'S UNIVERSITY: ST. JOHN'S UNIVERSITY; FREDERICK E. HUEPPE AND EDWARD J. MIRANDA, AS CO-PRESIDENTS OF ST. JOHN'S CHAPTER OF THE A.A.U.P.-F.A. AT ST. JOHN'S UNIVERSITY (an independent labor union),

Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY

A R G U M E N T

I

For the First Time, the Employer Argues that this Court's Opinion in DelCostello v. I.B.T., infra Has Superseded this Court's Opinion in U.P.S. v. Mitchell, infra.

The employer has now asserted that an individual employee can have no independent cause of action against the union because DelCostello v. I.B.T., 103 S. Ct. 2281 (1983) has "superseded" United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981). 1/

The employer contends that Section 301(a), 29 U.S.C. 185(a) of the Labor-Management Relations Act of 1947 relates only to "suits

1/ The union, on the other hand, rather than attempt to justify or even explain the reason for demanding and accepting the $150.00 for processing the employee-petitioner's wrongful discharge grievance, has elected not to submit any opposing brief to the petition. Indeed, the union has never pretended to have any real or genuine defense to the demand-for-monies allegations, and like the employer, had urged the lower courts to adopt res judicata as a bar to the proposed amended complaint. A position that is contrary to this Court's "mandate" to the lower courts in Foman v. Davis, 371 U.S. 178 (1962).

for violation of contracts between an employer and a labor organization or between any such labor organizations." and thus ignoring the unmistakable language of Smith v. Evening News Ass'n., 371 U.S. 195 (1962). In fact, Justice Brennan in DelCostello, supra, reinforced the rights of the individual employee: "It has long been established that an individual employee may bring suit against his employer for breach of a collective bargaining agreement Smith v. Evening News Ass'n., 371 U.S. 195, 51 L.R.R.M. at 2741 (1962)." (Vaca v. Sipes, 386 U.S. 171 (1967) was an employee's action only against the union.)

A. The Issue of DelCostello's Retroactivity Was Not Mentioned By Either the District or Circuit Court, Although Fully Briefed By Both the Employer and the Union.

In any event the $100.00 check demanded

and accepted by the union is dated May 4, 1981 (104a-105a), and the original complaint in the district court was filed 51 days later on June 25, 1981. In addition, Prof. Kaplan filed his grievance protesting his wrongful dismissal on December 19, 1980 (101a), and the union waited one (1) year before the aggrieved employee was made aware that the union would not pursue his wrongful discharge grievance to arbitration. Robesky v. Qantas Airways, 573 F.2d 1082, 1089-90, 98 L.R.R.M. 2090 (9th Cir. 1978). In Robesky although the claim against the employer was dismissed, the Ninth Circuit vacated the judgment in favor of the union in these words: (98 L.R.R.M. at 2097)

> "...[A] trier of fact could reasonably find that the Union's failure to disclose to [the employee] that her grievance would not be submitted to arbitration was without rational basis or was reckless and extremely prejudicial..."

II

Act of Omission as Constituting A Union's Breach of Its Duty of Fair Representation

The petition in this Court was docketed June 28, 1984, and on July 19, 1984, the Second Circuit issued its opinion in N.L.R.B. v. Teamsters, Local 282, 116 L.R.R.M. 3292 (2d Cir. 1984).

The issue before the Second Circuit Panel was whether or not an "act of omission" may be sufficient to constitute a fair representation breach, twice citing Robesky v. Qantas Airways, 573 F.2d 1082, 1089-90, 98 L.R.R.M. 2090 (9th Cir. 1978), and cited on page 9. of the petition now before this Court. Robesky, supra, dealt with the delay by the union in informing an employee regarding the status of a discharge grievance, and Teamsters, Local 282, supra, dealt with the failure by the union in informing all of the affected employees

of the contents of an arbitration award. (The Second Circuit Panel also answered the question left open in Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enf. denied, 326 F.2d 172 (2d Cir. 1963) by holding that a union may be found to have engaged in an unfair labor practice by breaching its statutory duty of fair representation, within the meaning of 29 U.S.C. 158(b)(1)(A) (1982).)

The Second Circuit Panel in Teamsters, Local 282, supra, concurred with other circuits that have considered similar issues: (116 L.R.R.M. at 3297)

> "We agree with other courts which have held that arbitrary conduct amounting to a breach is not limited to intentional conduct by union officials but may include acts of omission which, while not calculated

to harm union members, "may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary.' Robesky v. Qantas Empire Airways, Ltd., 573 F.2d 1082, 1089-90 (9th Cir. 1978); Warehouse Union, Local 860, I.B.T., v. N.L.R.B., 652 F.2d 1022, 1025 (D.C. Cir. 1981)...In addition, we have noted that the fiduciary duty which a union owes to its members requiring it to inform them of their obligations so that they may take whatever steps are necessary to protect their interests in their job. N.L.R.B. v. Local 182, I.B.T., 401 F.2d 509, 510 (2d Cir. 1968), citing, N.L.R.B. v. Hotel, Motel &

Club Employees' Union, Local 568,

320 F.2d 254, 258 (3rd Cir. 1963)."

Of greater significance however is footnote 13. at 116 L.R.R.M. at 3297 in which the Second Circuit Panel held, contrary to the district court's opinion in the case now at bar (30a), that a showing of "bad faith" is not the sine qua non to a finding of a union's breach. "We do not agree" said the Second Circuit, "that a showing of bad faith is a prerequisite for establishing the existence of a breach. While it certainly is a sufficient condition, it is not a necessary one. Jones v. T.W.A. 495 F.2d 790, 798 (2d Cir. 1974)."

While the district court on the petition now before this Court continued to refer to a "teaching schedule" grievance, a 1981 issue - wholly and totally unrelated - to Prof. Kaplan's wrongful discharge

grievance (30a-31a), the said district court, citing a pre-Vaca v. Sipes decision (Balowski v. U.A.W. 372 F.2d 829 (6th Cir. 1967) held that "...as a threshold matter, some ill motive or arbitrary action on the part of the Union to support his claim." must be shown before a union may be found guilty of a fair representation breach. The Second Circuit then affirmed. (14a-16a). Now, however, in N.L.R.B. v. Teamsters Local 282, supra, the Second Circuit holds that "an act of omission" breaches a union's duty of fair representation. (Petitioner respectfully urges this Court to consider that the union in the instant case committed two (2) acts of unfair representation: One, it demanded $150.00 as a precondition of processing

petitioner's wrongful discharge grievance, and, two, it waited one (1) year before putting petitioner on notice that it would not pursue his wrongful discharge grievance to arbitration.)

III

Under Bowen v. U.S. Postal Service, infra, This Court Has Now Placed Primary Liability for Lost Wages On The Union

The reason for the focus on the union's liability is this Court's recent opinion in Bowen v. U.S. Postal Service, 103 S. Ct. 588, 112 L.R.R.M. 2281 (1983), but, since the union has waived its right to file an opposing brief, the employer now seeks to assert its opposition to petitioner's claim against the union for lost wages., footnote, at page 5. of employer's opposing brief. 2/

2/ This Court in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) held that the employer, however, must remain a party to the action since it is the employer who percipitated the entire controversy by its wrongful discharge, but more important, only the employer can offer the wrongfully discharged employee reinstatement.

While Bowen and U.P.S., supra, modified Hines, supra, with respect to the apportionment of damages by placing primary liability for lost wages on the union because it caused the grievance procedure to "malfunction", the principal impact of DelCostello was to adopt the six month statute of limitations for Section 301/breach of fair representation suits, as contained in Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. §160(b). Moreover, in DelCostello Justice Brennan cited with approval that portion of the concurring opinion by Justice Stevens in U.P.S. v. Mitchell that even if there was an arbitration proceeding, (there was none in the case at bar), that such proceeding "...could not resolve the employee's claim against the union." 451 U.S. at 73, 113 L.R.R.M. at 2742-3.

Accordingly, U.P.S. v. Mitchell was

not "superseded" by DelCostello as asserted by the employer's opposing brief. In any event, neither the district court nor the Second Circuit Panel mentioned DelCostello in any of its opinions, although it was vigorously urged to do so by both the employer and the union.

The continued viability of U.P.S. v. Mitchell is further demonstrated by at least three subsequent decisions, one by the Fifth Circuit and by two district court opinions., viz., that a union can be liable for a breach of its duty of fair representation without a simultaneous or a prior adjudication of the employer's responsibility. Del Casal v. Eastern Air Lines, 634 F.2d 295 (5th Cir. 1981); Dutrisac v. Caterpillar Tractor Co., 511 F.Supp. 719 (N.D. Cal. 1981); Long v. I.U.E.W., 544 F. Supp. 1375 (E.D. Pa. 1982).

Accordingly, apart from failing to "heed" this Court's "mandate" in Foman v. Davis, supra, the lower courts failed to consider the recent impact of U.P.S. v. Mitchell, supra, with respect to the employee's independent cause of action as against the union. (Concurring opinion of Justice Stevens in Mitchell, 451 U.S. 56, 107 L.R.R.M. at 2007 (1981). However, more significant here is that even if the employer is found not to have breached the collective bargaining agreement, the union is nevertheless primarily liable for lost wages because it caused a "malfunctioning" of the grievance procedure. Bowen v. U.S. Postal Service, supra.

Finally, there is no case, to this petitioner's knowledge, that has allowed an employer to stigmatize a wrongfully

discharged employee with a charge of "bad character" and thereafter foreclose that employee from obtaining another definite teaching appointment. (114a-115a).

Conclusion

The employer's opposing brief is both conceptually, and legally, in error in asserting that the employee-petitioner has no independent cause of action against the union, and the union has elected not to submit any opposing brief. For the reasons enumerated in the Petition at pages (iii) to (viii), and as further amplified in this reply brief, it is most respectfully urged that the employee's Petition be granted or that this Court summarily reverse on the record.

Respectfully submitted,

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